

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Implementation of Section 302 of) CS Docket No. 96-46
the Telecommunications Act of 1996)

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**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

In the comment phase of this proceeding, the National Association of Broadcasters ("NAB") urged the Commission to further Congressional intent by ensuring that the carriage rules that are applicable to cable systems also apply to open video systems ("OVS"). In these brief Reply Comments, NAB takes to task those who would undermine the will of Congress by restricting the rights of broadcasters to bargain for retransmission consent. We also reiterate our recommendation that the Commission require OVS operators to provide broadcasters and other video programmers with proper notice of their intent to provide open video service.

I. THE COMMISSION MUST ALLOW BROADCASTERS THE FREEDOM TO BARGAIN WITH OVS OPERATORS FOR RETRANSMISSION CONSENT, IRRESPECTIVE OF ANY AGREEMENTS IN EXISTENCE WITH CABLE OPERATORS.

Several Regional Bell Operating Companies have suggested that the Commission should require broadcasters to offer their programming to OVS operators under the same terms and conditions as they do cable operators within the OVS coverage area.¹ In addition, U.S. West

¹ Comments of Bell Atlantic *et al.* at 28.

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posits that broadcasters should be required to elect either must carry or retransmission consent for *all* cable systems and OVS operators, so that broadcasters cannot “unfairly leverage its negotiations with one operator against another.”² None of the parties provide any legal or policy basis for their arguments, relying instead on the unsubstantiated claim that their suggestions would somehow make OVS more competitively viable.

NAB strongly urges the Commission to reject the proposals advanced by the telephone interests. First, there is no legal basis for restricting broadcasters’ retransmission consent rights on open video systems. As we noted in our initial Comments, the provision in Section 325(b)(3)(B) of the Communications Act that requires broadcasters to make a common election for all cable systems that serve the same geographic area applies by its terms only to cable systems. By definition, open video systems are not cable systems. Therefore, broadcast stations should be free to make different elections between must carry and retransmission consent on cable systems and open video systems, even if they serve the same areas.

Second, there is no policy basis for restricting broadcasters’ retransmission consent rights. Like other video programmers, broadcasters should receive fair value for the retransmission of their programming. Other video programmers are allowed to fairly bargain for carriage with multichannel video providers, with no restrictions that each agreement contain the same terms and conditions.³ Thus, there is no policy reason for the Commission to force

² Comments of U.S. West at 20

³ Under Section 628 of the Communications Act (47 U.S.C. § 528), video programmers who are affiliated with cable operators must provide programming to competing multichannel video systems. The terms and conditions of the agreement need not be the same, but can fairly take into account various business and economic factors. Even those limited restrictions on bargaining rights were grounded on Congressional findings of anticompetitive practices by cable programmers affiliated with cable operators. No such claims can be made regarding local television stations.

broadcasters to give up the must carry and retransmission consent rights recognized by Congress, and which Congress specifically directed the Commission to apply fully to OVS.

Third, the telcos' recommendations would create an administrative nightmare. Open video systems will likely cover a much broader area than the typical cable system, possibly enveloping the area served by 100 or more systems with which a broadcaster may have negotiated for carriage. A Commission requirement that all these agreements — fairly bargained for — suddenly conform with one another, would result in chaotic renegotiation, and possible violations of the antitrust laws.

Fourth, it is rather difficult to believe that the Regional Bell Operating Companies, with their tremendous financial clout, could be “unfairly leveraged” in carriage negotiations with local broadcasters.

As NAB has demonstrated, the proposal to restrict broadcasters' retransmission consent rights is unfounded and unworkable. We urge the Commission to reject the proposal.

II. THE COMMISSION MUST ENSURE THAT BROADCAST SIGNALS ARE AVAILABLE TO ALL OVS SUBSCRIBERS, AT ALL LEVELS.

Home Box Office (“HBO”) urges the Commission to forbear from requiring OVS subscribers to receive local broadcast signals as part of the OVS package, a requirement that HBO has called “must-buy.” In other words, HBO is asking the Commission to refrain from requiring that broadcast signals be available as part of a “basic” OVS package that would be automatically provided to all OVS subscribers. In the alternative, HBO asks that the Commission to apply the requirement equally to OVS and cable.⁴

⁴ Comments of HBO at 10-13.

The Commission does not have the authority to forbear from requiring that broadcasters be part of “basic” OVS. The Telecommunications Act specifically requires the Commission to apply Sections 614 and 615, among others, to OVS operators. These sections deal with carriage of local commercial and noncommercial broadcast stations. Both sections require cable operators to make broadcast stations available to *every* cable subscriber. The statute places the same requirement on OVS operators. All OVS subscribers, therefore, must be able to receive local broadcast signals as part of a “basic” OVS package.

The Commission does have some latitude in applying the requirement, however. For example, NAB and others urge the Commission to ensure that all subscribers be able to access local broadcast signals easily from any navigational menu that the OVS operator may provide.⁵ NAB supports this position. Ease of navigation is essential to the viability of an open video system. If subscribers must wend their way through a maze of menus in order to get from a video packager to the grouping of local broadcast stations, subscribers would be less likely to use the system. Complex navigation menus would also be a means for OVS operators to discriminate against video programmers, including local broadcasters. NAB therefore urges the Commission to require that broadcast stations be accessible from any menu offered on open video systems.

In this regard, as well, NAB supports the stance on channel positioning taken by ALTV.⁶ On open video systems that have a more traditional channel architecture, broadcast stations should appear on their over-the-air channel, the channel position on most cable systems as of the date of enactment of the Telecommunications Act, or a channel position mutually agreed

⁵ Comments of NAB at 16-17; Comments of the Association of Local Television Stations (“ALTV”) at 7; Comments of NBC at 13-14.

⁶ Comments of ALTV at 7.

upon by the broadcaster and the OVS operator. Such positioning would create less confusion among subscribers, giving them more assurance of easily locating their favorite local broadcast stations.

Still, the latitude ends at *how* broadcast stations are made available, not *whether* they are available, on “basic” OVS. The Commission must ensure that broadcast stations are received by all OVS subscribers.⁷

III. THE COMMISSION MUST ENSURE THAT THERE ARE ADEQUATE OVS REGULATIONS GOVERNING NOTICE OF COMMENCEMENT OF OVS OPERATION AND FILING OF CLAIMS AGAINST OVS OPERATORS.

The telephone company interests urge the Commission to impose as little regulation as possible on open video systems. While NAB recognizes that, due to the uncertainty of the nature of OVS, the Commission can promulgate few concrete regulations at this time, NAB recommends that the Commission keep an eye toward establishing more substantial regulations as OVS takes shape.

One regulation that is necessary at this time is a requirement that OVS operators notify broadcasters and other video programmers concerning the commencement of open video service. Without proper notification, broadcasters may be unaware of their carriage rights on an OVS serving their area, especially if the OVS operator is headquartered far from the broadcaster’s community of license. Proper notification is essential to fairness in OVS operation.

⁷ On another carriage issue, Bell Atlantic has asserted that OVS operators should not be responsible for compliance with the syndicated exclusivity and network nonduplication rules. Comments of Bell Atlantic at 25. We reiterate our belief (*see* NAB’s Comments at 10-12) that placing the responsibility for compliance on OVS operators is the best means to fairly and efficiently ensure that these rules apply to OVS.

In addition, Bell Atlantic proposes that, in order to make a *prima facie* claim of discrimination by OVS operators, a complaining video programmer must meet three criteria:

1. that the operator treated the programmer substantially differently than similarly situated programmers;
2. that the discrimination was commercially unreasonable in the video programming business; and
3. that the complainant suffered actual and substantial commercial harm from such discrimination.⁸

While NAB can agree with the first two elements, we believe the third is unwarranted and would unnecessarily impede the filing of legitimate complaints against OVS operators. The Telecommunications Act clearly prohibits unfair discrimination by an OVS operator against a video programmer.⁹ The extent and nature of any harm is irrelevant under the Act. Moreover, by the time an aggrieved party could be able to show harm, the party may have been placed at too great a competitive disadvantage to remain viable. The Commission should not raise unnecessary barriers to the filing of complaints against OVS operators.

III. CONCLUSION

Open video systems can provide broadcasters and other video programmers with real alternatives to gatekeeper cable operators. Unfortunately, because of the intangible nature of OVS, the Commission cannot promulgate many explicit rules to govern the OVS environment. NAB believes that the rules and concepts outlined in our initial Comments and these Reply



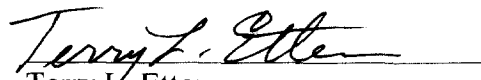
⁸ Comments of Bell Atlantic at 10.

⁹ However, because the Telecommunications Act specifically applies rules concerning cable carriage of broadcast signals to OVS, carriage of broadcast signals would not be discriminatory vis-a-vis other video programmers.

Comments are workable and essential to the proper administration of OVS. We urge the Commission to adopt our recommendations.

Respectfully submitted,

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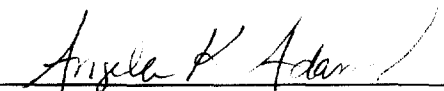
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